**Kelly and Stewart Environmental Service Co., Inc.** ***and*** **International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 6.** Case 1–CA–26841

January 11, 1991

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

Upon a charge, an amended charge, and a second amended charge filed by the Union on, respectively, November 21 and December 11 and 22, 1989, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on January 5, 1990, against Kelly and Stewart Environmental Service Co., Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Company timely filed an answer and an amended answer admitting to all the allegations in the complaint.

On October 15, 1990, the General Counsel filed a Motion for Summary Judgment. On October 17, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing, since about May 25, 1989, to make payments to various fringe benefit funds as provided for in the contract between the Respondent and the Union effective from August 1, 1988, through April 30, 1990. The complaint also alleges that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing, since about May 25, 1989, to pay unit employees the wage rates and other benefits set forth in the 1988–1990 contract. The Respondent's answer to the complaint as amended admits that it has failed to make contributions to the various benefit funds and to pay the unit employees contractual wage rates and other benefits. The Respondent's answer states that it has failed to comply with these contractual requirements because ''it has sustained a massive financial loss'' and ''has been without funds sufficient to remit'' to the Union.

It is well established that an employer's economic necessity is not a defense to the unilateral repudiation of the monetary provisions of a collective-bargaining agreement.[1] An employer acts in derogation of its bargaining obligations under Section 8(d) of the Act, and thereby violates Section 8(a)(5) and (1) of the Act, when, during the life of a collective-bargaining agreement between it and a union, it unilaterally modifies or otherwise repudiates terms and conditions of employment contained in the agreement.[2]

We therefore find the Respondent's answer does not raise any legal or material issues of fact that warrant a hearing. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a corporation with an office and place of business in Boston, Massachusetts, operates as an asbestos-removal contractor in the building and construction industry. During the 1989 calendar year, the Respondent provided services valued in excess of $50,000 for enterprises within the Commonwealth of Massachusetts, which enterprises are directly engaged in interstate commerce. The Respondent admits, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

Since about December 1, 1987, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the bargaining unit, and since that date has been recognized as the representative by the Respondent. That recognition has been embodied in successive collective-bargaining agreements, the most recent effective by its terms for the period August 1, 1988, through April 30, 1990. The unit consists of all asbestos-removal workers employed by the Respondent, but excluding all other employees, guards, and supervisors as defined in the Act. This unit constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. At all times material, the Union, by virtue of Section 9(a) of the Act,

[1] *Universal Transfer Co.*, 266 NLRB 402 (1983); *FWD Corp.*, 257 NLRB 1300 (1981); *Morelli Construction Co.*, 240 NLRB 1190 (1979).

In Member Oviatt's view, there may be limited circumstances, not present here, in which an employer's financial inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To make this defense successfully, an employer must establish that it continued to recognize—and did not repudiate—its contractual obligations. To satisfy this requirement, an employer must prove that its nonpayment was followed by its request to meet with the union to discuss and resolve the nonpayment problem. In so doing, an employer demonstrates its adherence to the contract and the bargaining process. In such circumstances, Member Oviatt would find that an employer's nonpayment of contractually required benefit fund payments would not violate Sec. 8(a)(5) of the Act.

[2] *Morelli Construction Co.*, supra.

has been, and is now, the exclusive bargaining representative of the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since about May 25, 1989, the Respondent has failed and refused to make payments to various fringe benefit funds as provided in the parties' most recent contract, and to pay contractual wage rates and other benefits to unit employees. We find that the Respondent by this conduct has repudiated the contract and has failed and refused to bargain collectively with the Union as the representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing to make contributions to various fringe benefit funds and to pay contractual wage rates and other benefits, as required by the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to comply with the 1988–1990 collective-bargaining agreement by making the required contributions to various benefit funds, retroactive to May 25, 1989.[3] The Respondent shall also reimburse its employees for any expenses ensuing from its unlawful failure to pay such amounts, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, we shall order the Respondent to make whole unit employees for any loss of wages and other benefits they may have suffered as a result of the Respondent's failure to adhere to the collective-bargaining agreement since May 25, 1989. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as provided in *New Horizons for the Retarded*, supra.

## ORDER

The National Labor Relations Board orders that the Respondent, Kelly and Stewart Environmental Service Co., Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 6 as the exclusive collective-bargaining representative of the employees in the following appropriate unit by failing to make the various benefit fund contributions and to pay the contractual wage rates and other benefits required by the 1988–1990 collective-bargaining agreement:

> All asbestos removal workers employed by the Respondent, but excluding all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the various fringe benefit fund contributions and pay the contractual wage rates and other benefits that have been due since May 25, 1989, pursuant to the collective-bargaining agreement, as set forth in the remedy section of this decision.

(b) Make whole unit employees for any losses resulting from the Respondent's failure to make various fringe benefit fund contributions and to pay contractual wage rates and other benefits, since May 25, 1989, as provided under the collective-bargaining agreement, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Boston, Massachusetts, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] Any additional amounts owed employee benefit funds shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 6 as the exclusive representative of the employees in the following bargaining unit by failing to make the various fringe benefit fund contributions and to pay the contractual wage rates and other benefits required by our 1988–1990 collective-bargaining agreement with the Union.

All asbestos removal workers employed by us, but excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the various fringe benefit fund contributions and pay the contractual wage rates and other benefits that have been due since May 25, 1989.

WE WILL make whole unit employees for any losses resulting from our refusal to make the various fringe benefit fund contributions and to pay the contractual wage rates and other benefits since May 25, 1989, with interest.

KELLY AND STEWART ENVIRONMENTAL SERVICE CO., INC.